ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Concerning Children's Television Programming	)	MM Docket No. 93-48
	)	
Revision of Programming Policies for Television Broadcast Stations	)	
	)	
To the Commission:	)	

JOINT COMMENTS

COSMOS BROADCASTING CORPORATION
COX BROADCASTING, INC.
FIRST MEDIA TELEVISION, L.P.
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SUMMARY OF ARGUMENT

The Commission's proposal herein ignores the express language of the Children's Television Act of 1990,[1/] CTA's Congressional intent and the First Amendment, not to mention the agency's own policy and precedent.

The CTA neither requires nor contemplates the Commission's proposed public information requirements. Commission prescription of stations' business practices exceeds the agency's jurisdiction under both the CTA and the Communications Act. Moreover, there is no demonstrated need for such unprecedented government-imposed procedures for advertising or promoting children's educational/informational programming.

1/ Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-100, codified at 47 U.S.C. §§ 303a, 303b, 394 ["CTA"].

The Commission must not narrow its current definition of children's programming. Congress intended that under the CTA broadcasters would retain maximum discretion and flexibility to meet the needs of children through a wide variety of programming. In keeping with its past policy of deferring to broadcasters' broad discretion in responding to the needs of their communities, the Commission must comply with this Congressional mandate.

Any exclusive focus on "core" programming, limited to standard-length programming with an educational objective and aired only during specified hours, ignores the CTA's plain language, which speaks in terms of meeting children's educational/informational needs through "overall programming, including [but not limited to] programming specifically designed to serve such needs."[2/] The Commission's proposed "core" programming requirement would ignore the CTA's express direction, and make specifically designed children's educational programming the primary, if not the exclusive, measure of compliance. This the Commission cannot and should not do.

Quantitative processing guidelines or programming standards would likewise conflict with the CTA. Congress expressly directed the Commission to avoid quantitative guidelines and to defer instead to licensees' good faith discretion. The Commission itself has said that minimum programming standards involve the government too deeply in decisions concerning program content. Numerous Commission decisions have recognized the

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2/ 47 U.S.C. § 303b(a)(2).

constitutional and policy defects of minimum quantitative programming requirements. In particular, the Commission has repeatedly refused to adopt quantitative standards for the presentation of particular types of programming. It should also refuse to do so here.

The Commission's proposed quantitative rules fail to meet the First Amendment test that restrictions on broadcast speech must be narrowly tailored to further a substantial governmental interest. Not only is there no evidentiary basis for any claimed substantial governmental interest, but the Commission's proposals are not narrowly tailored but rather are highly intrusive.

The proposal to permit inter-station sponsorship would create cost and public interest disparities within markets. All stations should be held to the same standard, without new program sponsorship rules.

The television industry has responded fully to Congress' call to improve the quality and quantity of children's educational and informational programming. The Commission's proposed venture in social engineering is unnecessary, and they are neither authorized by statute nor permitted by the First Amendment. Licensees must remain free of governmental interference as they continue to fulfill their obligations to serve their child audiences. The Commission should not change its current CTA rules.

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JOINT COMMENTS

Cosmos Broadcasting Corporation, Cox Broadcasting, Inc., First Media Television, L.P., River City Broadcasting, L.P., and Paxson Communications Corporation ["Joint Parties"], by their attorneys, submit herewith their Joint Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[3/]

Introduction

The Children's Television Act of 1990 requires stations to serve "the educational and informational needs of children through the licensee's overall programming, including programming

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3/ Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broadcast Stations, Notice of Proposed Rulemaking, MM Docket No. 93-48, 10 FCC Rcd 6308 (April 7, 1995) ["Notice"].

specifically designed to serve such needs."[4/] The Commission adopted rules implementing the CTA in 1991.[5/]

In 1993, only two years after their adoption, the Commission began an inquiry to examine whether those rules should be revised.[6/] The Notice herein continues that proceeding: among other proposals, the Commission suggests it could impose quantitative programming requirements to remedy what it perceives as broadcasters' failure to meet the CTA's goals.

Such action cannot be justified by reference to the CTA. Congress directed the Commission to leave the selection, mix and scheduling of children's programming[7/] to the reasonable good faith discretion of individual licensees, which are optimally positioned to respond to the specific conditions within each particular market.[8/] The Commission's proposal to adopt a

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4/ 47 U.S.C. § 303b(a)(2).

5/ In the Matter of Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, MM Dockets Nos. 90-570 and 83-670, 6 FCC Rcd 2111, recon. granted in part, 6 FCC Rcd 5093 (1991).

6/ Policies and Rules Concerning Children's Television Programming; Revision of Programming Policies for Television Broadcast Stations, Notice of Inquiry, MM Docket No. 93-48, FCC 93-123 (March 2, 1993) ["Notice of Inquiry"].

7/ Unless otherwise indicated, references to "children's programming" mean children's educational/informational programming.

8/ See H.R. Rep. No. 101-385, 101st Cong., 1st Sess. (1989)("House Report"); S. Rep. No. 101-227, 101st Cong., 1st Sess. (1989)("Senate Report").

specific quantitative definition of children's programming substantially exceeds its statutory authority.

The Commission's proposed mandatory public information program also oversteps its mandate under the CTA as well as the Communications Act of 1934, as amended [the "Act"],[9/] neither of which permit the agency to regulate stations' business decisions.[10/] Moreover, there has been no demonstration of public need for unprecedented government-imposed procedures for advertising or promoting television stations' educational/ informational programming for children.

The Commission must not let the laudable nature of its goals -- enhanced television programming for the nation's children -- obscure its obligation to regulate in a manner consistent with the Constitution and with Congress' intent in adopting the CTA. The Joint Parties agree with Congress that the best -- and only constitutional -- means of furthering the CTA's goals is to rely on licensees' good faith discretion. Any other course impermissibly conflicts with First Amendment freedoms.

Particularized rules, if adopted, would contravene Congress' strongly expressed intent that licensee discretion not be compromised by the CTA. The detailed regulation of programming minutiae which the Commission contemplates will stifle licensee flexibility and creativity, to the ultimate detriment of

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9/ 47 U.S.C. § 151 et seq.

10/ FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

stations' child audiences. There should be no change in the FCC's existing rules or regulatory approach.

The Commission Must not Mandate Personnel and Public Information Requirements

The Commission proposes to require stations to implement comprehensive public information procedures regarding their children's programming. The mandated components of this program are: identifying children's programming when it is aired; providing program guide publishers with information identifying children's programming; designating a station employee responsible for responding to public comments in this area, and publicizing that individual's identity; and separating children's programming reports from other material in stations' public inspection files.

The CTA neither requires nor contemplates such regulatory intrusion into stations' business operations. The CTA requires stations to serve "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs."[11/] Nowhere does the statute suggest that it requires a mandatory public information scheme. Neither the House Report nor the Senate Report make any reference to a new public information obligation for broadcasters. To the contrary, Congress stressed the limits on the authority the CTA grants the Commission, noting, for example, that "The broadcaster has discretion to meet

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11/ 47 U.S.C. § 303b(a)(2).

its public service obligation in the way it deems best suited."[12/] Nowhere in this language is there any suggestion that the Commission should intrude on licensee's business and operational practices.

Decisions concerning the extent and nature of the promotion of children's programming, like the promotion of other types of programming, must continue to rest with licensees' sound discretion. Stations have a compelling commercial incentive to build audiences for children's programming; there is no practical need for the government to interfere in such matters.

More significantly, the FCC has no jurisdiction over stations' business practices. As the Supreme Court said in FCC v. Sanders Bros. Radio Station, "The [Communications Act] does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."[13/] The manner in which stations promote their programming is thus a business decision that is outside the scope of the FCC's authority under either the CTA or the Act; the Commission may not intrude into discretionary business practices with a mandated publicity program.

12/ Senate Report at 17.

13/ FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). The FCC has thus declined to become involved in matters such as licensees' telephone listings and staffing decisions. See, e.g., Security Broadcasting of Baton Rouge, Inc., FCC 76-1159 (January 7, 1977); SRD Broadcasting, Inc., FCC 75-1395 (December 30, 1975); Max M. v. Leon, Inc., FCC 75-1202 (November 6, 1975).

Designating Children's Educational/Informational Programming. The Notice tentatively concludes that stations should expressly identify children's educational/informational programs, both when they are aired and in material supplied to program guide publishers.[14/] Nowhere does the Commission establish that the public currently lacks sufficient programming information to make informed programming decisions. Rather, its proposal is based upon unsupported speculation that requiring licensees to provide more information concerning children's educational/informational programming would be beneficial.

The Commission has long found it consistent with the public interest for licensees to present programming responsive to the needs and concerns of their communities.[15/] The Commission has never, however, suggested that licensees be required to engage in particular program promotional activities as part of their public interest programming obligation. There is no reason why children's programming should be treated any differently. Certainly, the CTA imposes no such obligation. To the contrary, as demonstrated above, any such requirement would exceed the

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14/ Notice at ¶ 24. Obviously, there is no guarantee that publications will, in fact, publish the information which has been provided.

15/ Report and Statement of Policy re: Commission en banc Programming Inquiry, 44 FCC 2303 (1960); The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, 98 FCC 2d 1076, 1090-1092 (1984) [citations omitted]; In re Applications of Roanoke Broadcasting Company, Inc., Memorandum Opinion and Order, FCC 83-461, (October 6, 1983).

Commission's statutory authority. FCC v. Sanders Bros. Radio Station, supra.

Not only would such a requirement be impermissible regulation: it would also be unwise. Mandating specific program designations invites controversy over licensees' good faith characterizations, and will inevitably involve the FCC in detailed content analysis. Moreover, designation of a program as "educational/informational" could create a disincentive to viewing by children who do not want to watch such programming. Conversely, a failure to label a program as "educational/informational" because of a fear that the presence of an entertainment component might invite a challenge to the licensee's characterization could cause some viewers not to watch a program, and thus to miss a potentially informative show. The public does not need governmentally-mandated assistance in making viewing decisions for its children.

Licensees must retain the discretion to decide how best to publicize station programming, including children's educational/informational programming. As discussed herein, the CTA requires the Commission to permit licensees to retain full discretion with respect to children's programming. A necessary component of such discretion is the manner in which such programming is promoted. It would not serve the interest of either the public or licensees to mandate program content identification. Individual licensees are best able to determine how to tell their viewers about their programs: Commission

interference in that function is constitutionally impermissible and unwise.

On-Air Announcements. Again without any factual basis, the Commission suggests that the public is so ill-informed about children's educational/informational programming that stations should be required to air periodic on-air announcements concerning such programming. And again, its proposal goes far beyond CTA's requirements: as demonstrated above, nowhere does CTA suggest that its expressly-stated programming and commercial requirements include additional unspoken obligations. Certainly, the Notice fails to offer any statutory basis for its proposals.

Nor is there any overriding need for such announcements. Indeed, the Commission at one time required periodic announcements concerning licensees' broader public interest obligations.[16/] However, the Commission eliminated that requirement after eight years' experience, concluding that:

> To the extent that the listening public should be educated concerning the Commission's oversight functions and the availability of public recourse at the Commission, this can be accomplished every two and one-half years in connection with the pre- and post-filing announcements made by all licensees. There is no overriding need to require these year-round regular announcements.[17/]

16/ Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, Final Report and Order, Docket No. 19153, 43 FCC 2d 1 (1973) [adopting 47 C.F.R. §§ 73.1202, "Public Notice of Licensee Obligations"].

17/ Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, Report and Order, BC Docket No. 80-253, 49 RR 2d 740, 756-57 (1981) [removing 47 CFR §§ 73.1202(a),(b),(c) and (d)].

Here, too, no "overriding need" for regular announcements concerning children's programming has been demonstrated. The public can be fully informed by reading program guides and by watching programs. It does not need governmental assistance in this area.

Children's Television Liaison. The Commission also proposes to require stations to designate a person "responsible for collecting comments on the station's compliance with the CTA."[18/] Again, however, the agency's eagerness to regulate in this area has caused it to ignore the statutory limits on its jurisdiction: neither the Act nor the CTA give the agency authority to mandate station staffing.

Such a requirement is, in any event, unnecessary. Licensees are conscientious in responding to members of the public who have comments or concerns about their programming and operations. If viewers want information about programming, all they need to do is ask. If they want to complain, stations are ready to listen and consider their complaints. There is no need for the FCC to dictate the manner in which licensees interact with their communities.[19/]

18/ Notice at ¶ 25.

19/ With respect to the Commission's proposal for license renewal procedures, Notice at ¶ 74, the Joint Parties submit that challengers should be required to demonstrate that they have contacted the licensee to attempt to resolve any alleged problems prior to the filing of any complaint. Procedures should allow licensees maximum discretion in determining best how to respond to and resolve such complaints. Such an approach of requiring timely resolution of children's programming complaints would

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Public File Requirements. The Commission also proposes to require that children's television programming information be physically separated from other public file material.[20/] While the Joint Parties would have no objection to such a requirement, they also note that it is unnecessary: public file information is generally clearly labeled, with each type of document in its own file folder.

The Joint Parties oppose any requirement that licensees provide a brief description of how particular programs meet a definition of "educational/informational" programming. Such a requirement would impose a substantial additional burden to the already-burdensome preparation of children's program reports.[21/] If questions are raised concerning the educational/informational value of a particular program, then the licensee could supply a justification at that time. But if there is no question raised concerning a particular program's educational/informational value, it is superfluous to require extended program descriptions as a routine matter.

19/ (...continued)
serve the public far better than allowing such matters to rest until license renewal.

20/ The Joint Parties assume that this proposal does not contemplate establishment of a separate drawer or file for children's programming material. Such a requirement would require stations to waste valuable office space without any offsetting public interest benefits.

21/ The Joint Parties believe that stations should continue to have the option of preparing children's program reports on either an annual or a quarterly basis.

The Proposed Definition of "Core" Children's Programming Conflicts with the CTA and is Overly Narrow

The Commission proposes to limit the programming which would be considered as complying with the CTA to programming that is (1) specifically designed to meet the educational and informational needs of children ages 16 and under; (2) has education as a significant purpose; (3) is aired between 6 a.m. and 11 p.m.; (4) is regularly scheduled; and (5) is of "substantial" length.[22/] Stations would be required to identify and report the educational objective and target audience of this "core" programming.[23/]

This restrictive focus on narrowly-defined "core" programming is not what Congress had in mind when it passed the CTA. The CTA requires that stations serve "the educational and informational needs of children through the licensee's overall programming, including [but not limited to] programming specifically designed to serve such needs."[24/] Congress thus clearly recognized that much television programming, even if not expressly educational in intent, can further children's positive development.

Congress did not focus exclusively on educational programming. It did not suggest that standard length programming was the only type of programming that could satisfy the CTA's

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22/ Notice at ¶ 36.

23/ Id.

24/ 47 U.S.C. § 303b(a)(2) [emphasis supplied].

requirements. It did not suggest that special or irregularly-scheduled programs had no educational or informational value. It did not essay to dictate program's scheduling. Congress did not, in short, authorize the extraordinarily narrow approach to CTA programming which the FCC apparently now advocates.

To the contrary, the CTA's legislative history is replete with repeated references to the wide variety of programming which will fulfill its requirements. For example, the Senate Report states:

> The [children's programming] provision...does not exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited.[25/]

> The FCC can still consider general audience programming, but it also must consider whether the licensee has provided educational and informational programming that was produced specifically for pre-school and school-aged children. The appropriate mix is left to the discretion of the broadcaster.[26/]

The House Report is even more emphatic:

> The Committee believes that a broad range of programming will meet the standard of service to the child audience required by the Section. The Committee notes that general purpose programming can have an informative and educational impact and thus can be relied upon by the broadcaster as contributing to meeting its obligation in this important area...Under this legislation the mix is left to the discretion of the broadcaster...[27/]

25/ Senate Report at 17-18.

26/ Senate Report at 23.

27/ House Report at 17 [citation omitted].

The floor debates, too, emphasized Congress' intent that licensees' be accorded broad discretion in selecting a range of programming which would comply with CTA requirements.

> We have left the licensee the greatest possible flexibility in how it discharges its public service obligation to children. We recognize that there is a great variety of ways to serve this unique audience...The list can be extended as far as the imagination of the creative broadcaster and must rely on the good-faith, dedicated judgment of the broadcaster...The Committee expects that the Commission will continue to defer to the reasonable programming judgments of licensees in this field."[28/]

> At the same time, broadcasters an also count among their service to children programs primarily intended for general audiences which also serve the needs of children. It would be arbitrary and against common sense to hold that such efforts hold no value for children...Of course, it is expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensees [sic] judgement to determine how to serve the educational and informational needs of children in its community.[29/]

The Notice's proposals flatly ignore Congress' express direction that CTA programming be broadly defined.[30/]

Educational Objective. Restriction of "core" programming to programming with an educational objective ignores CTA's plain

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28/ 136 Cong. Rec. S10121-22 (daily ed. July 19, 1990)(remarks of Mr. Inouye).

29/ Id. at S10126-10127 (remarks of Mr. Wirth).

30/ The Joint Parties recognize reports of isolated instances in which programming which appears to be strictly entertainment has been cited as educational/informational programming. (Interestingly, the reports often do not indicate what other programming may have been presented pursuant to CTA requirements.) Such exceptions (many of which occurred immediately following CTA's adoption when stations may have not been fully familiar with its requirements) do not, however, establish widespread industry mischaracterization of appropriate CTA programming, and certainly afford no basis for burdening all television stations with an artificially narrow definition of such programming.

language, which speaks in terms of programming that meets children's "educational and informational" needs.[31/] Given Congress' express direction that informational as well as educational components of programming must be considered, the Commission cannot narrow the focus on its own.[32/]

Television programming has an infinite capacity to educate, but it can also entertain and inform. The three functions need not be mutually exclusive. Indeed, unlike non-commercial stations which have education as a primary goal, commercial stations play a unique role in combining the three functions. Indeed, a combination of entertainment and education or information can be the most effective way of capturing and holding a child's interest. A program that is specifically designed only to be "educational" may lack sufficient entertainment components to be viewable. A definition of "core" programming that is weighted exclusively to an educational purpose could defeat that purpose.[33/]

31/ 47 U.S.C. § 303b(a)(2) [emphasis supplied].

32/ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43 [emphasis supplied].

33/ The Commission should not require licensees to describe each program's educational objective. Not only could this require licensees to employ educational consultants for the preparation of their children's program reports: it also invites

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The Commission must recognize that education comes in many forms and that information comes in even more. It should not assume the role of "educational programming czar." Rather, it should continue to use its present broad definition of children's educational/informational programming.[34/]

Target Audience. The Commission also proposes to limit "core" CTA programming to programming specifically designed for children aged 16 and under. In doing so, it suggests that it will disregard both stations' general audience programming and their non-broadcast efforts in evaluating CTA compliance. Again, however, the Commission ignores CTA's plain language and legislative history.

Station news programming, for example, is designed for a station's total audience but provides a critical educational and informational service to child viewers, particularly for older children. Stations' public service programming, too, has interest and import for children. Indeed, it is not unusual for teachers to assign students to watch particular news or public affairs programs as part of their classwork. Yet the Commission

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33/ (...continued)
Commission involvement in program content review in the event of quarrels over licensees' good faith programming descriptions. The CTA did not direct the FCC to transform licensees into educational analysts. Yet this is exactly what this requirement contemplates.

34/ The Commission correctly recognizes the importance of licensee judgment in proposing to allow licensees to elect their target audiences. Notice at ¶ 39. It should defer to licensee discretion with respect to the selection and characterization of programming as well.

would apparently ignore the obvious public interest of this programming.

Apparently unlike the Commission, Congress recognized that general audience programming could serve children's educational/informational needs just as well as programming which is specifically designed for children. CTA thus directs that general audience programming be considered in evaluating stations' compliance with its requirements. The Commission cannot ignore this direction.[35/] As demonstrated above, Congress recognized that general audience programming could serve children's educational/informational needs just as well as programming which is specifically designed for children. The FCC therefore must give stations' general audience programming decisional weight in evaluating CTA compliance.[36/]

Program Length. The Commission's focus on "standard-length" programming fails to recognize the value of short educational vignettes for children. These brief, well-produced educational messages can have a substantial impact on children, particularly when aired in lieu of a commercial message within a popular children's entertainment programming. A short intense message will frequently have a more lasting impact on a child than a longer, more involved presentation. In fact, short segments

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35/ Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

36/ Similar considerations apply to licensees' non-broadcast efforts: they, too, must be considered in evaluating CTA compliance.

contained within popular entertainment programs are more likely to reach children who may not otherwise watch educational programming. Short segments as well as longer programs should continue to be considered to comply with the CTA.

Program Scheduling. The Commission's proposed requirement that "core" CTA programming be regularly-scheduled cannot be justified either by reference to CTA's legislative history, see discussion supra, or by policy. Special, one-time-only or monthly programs can have a substantial educational effect, and should not be discounted for CTA compliance purposes. Indeed, special programs may receive more production and promotion efforts that regularly scheduled programs. They provide an opportunity to concentrate more effectively on a particular audience or topic. A single locally-produced special may be far more effective, and responsive to local children's needs, than a series of syndicated programs. The Commission should not confuse quantity with quality. The requirement that "core" programming be regularly-scheduled should be abandoned.

Similarly, the Commission should not impose scheduling restraints. Not only would such a restraint conflict with the Commission's authority under both the constitution[37/] and CTA, it ignores the benefits of programming scheduled at other than prime hours.

37/ The First Amendment clearly does not countenance a governmental agency stating when particular speech may occur. Yet the Commission proposes to intrude in such matters, asking, for example, whether it should consider programming during a single hour (6 - 7 a.m.) as satisfying this requirement.

Educational programming scheduled early in the morning, for example, would be a welcome means of keeping a small child gainfully occupied at a time when parents want to sleep (particularly on weekends). Similarly, for parents of teenagers, educational programming which is broadcast late at night may be a desirable alternative to other programming available at those hours.

In any event, scheduling of programming becomes almost a meaningless consideration given the almost universal availability of VCR's:[38/] the time-shifting capability they provide makes the actual broadcast time of a program essentially irrelevant. If a parent wants a child to watch a particular program, it is only necessary to record it and rebroadcast it at the desired time. VCR's have, in short, reduced to a point of insignificance the program scheduling concerns which might have been relevant twenty years ago. There is thus no need for children's television scheduling restrictions.

38/ TV Cable Factbook No. 61, Services Volume at I-8 reports that in 1975 there were 30,000 VCR's in use in the United States. By 1992, that number had grown to 94,850,000, exceeding the total number of television households (91,788,100) reported by Arbitron in May, 1992. Broadcasting & Cable Yearbook 1993 at C-224.

Quantitative Program Processing Guidelines or Programming Standards Would Violate the First Amendment

As an alternative to a wait and see approach, under which the Commission would monitor the effect of new CTA regulations,[39] the Commission proposes either specific quantitative processing guidelines or, alternatively, programming standards for "core" children's programming.[40] Under the proposed safe harbor processing guidelines, a license renewal application reflecting broadcast of a specified number of hours per week of children's programming would not be subject to further review for CTA programming compliance. A licensee that did not meet the processing guideline would have to demonstrate that it had complied with CTA in other ways.[41]

Under a specific programming standard, each licensee would be responsible for airing a minimum amount of core programming. Stations which failed to do so would have a heavier burden of justifying their performance than under processing guidelines,

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39/ The Joint Parties urge the Commission to adopt this approach. There is no need for additional regulation in this area: the marketplace and broadcast licensees are responding more than adequately to CTA's policy concerns regarding children's television programming.

40/ Notice at ¶ 37.

41/ Notice at ¶ 56. As discussed above, this proposed exclusive focus on "core" programming conflicts with CTA's express terms.

although there would still be an opportunity to demonstrate CTA compliance.[42/]

The Commission itself has acknowledged that "processing guidelines in the renewal area can take on the force of a rule, at least in the perception of licensees."[43/] As a practical matter, processing guidelines would have the same impact on stations' programming decisions as programming standards. Virtually every television station in the country would adjust its programming practices to conform to processing guidelines in order to avoid the expense and delay of extraordinary justification of programming decisions at renewal time.[44/] The First Amendment concerns that the Commission's proposals raise are identical whether labeled processing guidelines or program standards.

Consistent with this recognition of the constitutional frailty of specific programming requirements, the Commission has repeatedly refused to impose quantitative standards for the

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42/ Notice at ¶ 59.

43/ Notice of Inquiry at ¶ 9.

44/ One need only recall the impact of the Commission's prior program processing guidelines (former 47 C.F.R. § 0.281(a)(8)) on stations' program choices: very few stations intentionally presented less than the amounts of programming specified in the guidelines.